
**United States Court of Appeals
For the Ninth Circuit**

YOUNG CORPORATION, a Washington Corporation,
Plaintiff-Appellants,

vs.

ROY F. JENKINS, and JANE DOE JENKINS,
his wife, dba DOROY GRAPPLE COMPANY
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

APPELLANT'S REPLY BRIEF

BENJAMIN F. BERRY
CARL G. DOWREY
SEED, BERRY & DOWREY

1502 Norton Building
Seattle, Washington

FILED

L. R. GEISLER

OCT 23 1967

Attorneys for

Plaintiff-Appellant M. B. LUCK, CLERK

2400 S. W. Fourth Avenue
Portland, Oregon

OCT 24 1967

United States Court of Appeals
For the Ninth Circuit

YOUNG CORPORATLON, a Washington Corporation,
Plaintiff-Appellants,

vs.

ROY F. JENKINS, and JANE DOE JENKINS,
his wife, dba DOROY GRAPPLE COMPANY
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

APPELLANT'S REPLY BRIEF

BENJAMIN F. BERRY
CARL G. DOWREY
SEED, BERRY & DOWREY

1502 Norton Building
Seattle, Washington

L. R. GEISLER
Attorneys for
Plaintiff-Appellant

2400 S. W. Fourth Avenue
Portland, Oregon

INDEX

	<i>Page</i>
VALIDITY	1
A. The Prior Art Does Not Show a Two Point Grapple	1
B. Lindberg is the First Inventor	5
INFRINGEMENT	7
A. The Claim Language Encompasses the Accused Grapple Structure	7
B. Admissions Made During Interference Proceeding	8
CERTIFICATE OF SERVICE	10

TABLE OF CASES

<i>Albright-Nell Co. v. Autosteam Process Co.</i> , 7 Cir., 1934, 70 F.2d 959	8
<i>Christie v. Seybold</i> , 55 F.69 (CCA-6 1893)	6
<i>Consolidated Vultee Aircraft Corp. v. Maurice A. Gorbell, Inc.</i> , 204 F.2d 946 (CCA-9 1953)	5
<i>Graham v. John Deer Co.</i> , 1966, 383 U.S. 1, 15 L.Ed.2d 545	4
<i>Hann v. Venetian Blind Corp., et al</i> , 111 F.2d 455, (CCA-9 1940)	5
<i>Haughey v. Lee</i> , 151 U.S. 283	8
<i>L. P. Larsen, Jr., v. William Wrigley, Jr.</i> 7 Cir., 253 F. 914, 918	9
<i>Lockwood v. Langendorf United Bakeries, Inc.</i> , 9 Cir., 1963, 324 F.2d 82, 88	7
<i>Nelson v. Batson</i> , 9 Cir., 1963, 322 F.2d 123, 135....	7

TABLE OF CASES

	<i>Page</i>
<i>W. F. & John Barnes Co. v. International Harvester Co.</i> , D. C. N. D. Ill. E. D., 1943, 51 F. Supp 254	8

TEXTBOOKS

Interference Law and Practice, Revise and Caesar § 178, Period of Required Diligence, Vol. 1, page 549	5
--	---

UNITED STATES STATUTES

35 U. S. C. 102 (g)	5, 6
---------------------------	------

United States Court of Appeals
For the Ninth Circuit

YOUNG CORPORATION, a Washington
Corporation, *Plaintiff-Appellant,*

vs.

ROY F. JENKINS, and JANE DOE
JENKINS, his wife, dba DOROT
GRAPPLE COMPANY,
Defendants-Appellees.

No. 22083

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

APPELLANT'S REPLY BRIEF

VALIDITY

A. THE PRIOR ART DOES NOT SHOW A TWO
POINT GRAPPLE

On page 6 of their Brief, Defendants-Appellees refer to the District Court's Findings (Finding 8, R42) as being to the effect that *two point grapples* as well as two point tongs are very old and shown in the prior art. In other portions of their Brief (page 2, line 16 and page 4, line 10) Defendants-Appellees seek to equate tongs and grapples and to infer that *two point grapples* are shown in the prior art. Further, on page 6 of their Brief, it is stated that the

read and prevent (Exhibit 117) and the Collom et al patent (Defendant's Exhibit 112), discussed in Defendants-Appellees' Brief, were examined by the Examiner and considered in detail in the examination of the Lindberg patent (Plaintiff's Exhibit 2, pages 15 and 30). The Lindberg and Collom et al devices are thought to function quite differently from the Lindberg device. It is noted that these devices do not utilize a cable for exerting a strong lateral "squeeze" on the object being lifted as in the Lindberg device. The cable 8 of Collom et al and the cable 10 of Wirkkala operate to open the jaws rather than to close them. In the case of prior art logs, the log which the Wirkkala patent is an improvement upon, the jaws are provided with sharp points 12 of Wirkkala, which dig into the log and which must be manually operated. The log actually "hangs" from the jaws.

With regard to the showing of

512,825 (Defendant's Exhibit 103), characterized by Defendants-Appellees' attorney as being the "best reference" (Transcript of Proceedings, page 107), it is argued that Fig. 2 thereof shows a two point grapple (Defendants-Appellees' Brief, page 7). This interpretation is in error since Fig. 2 of the Hunt patent shows an end elevation of the bucket or basket type grapple shown in side elevation in the other figures of the drawing. The Court's attention is invited to the fact that two sets of two links F are indicated (referring to the two "F" notations on the left side of Fig. 2) which means to one familiar to mechanical drawings that the same frame structure is utilized with the legs A' as is used with the bucket elements A. This means, of course, that there are at least four of the elements A' making up what is known to the art as a "basket" type grapple and certainly not a two point grapple. To say that the Hunt patent, Fig. 2, shows a two point grapple would be the same as saying that Fig. 1 of the patent to Harrington (Defendant's Exhibit 111) shows a two point grapple. It is error to call a basket grapple a two point grapple simply because only the two end jaws are revealed in an end elevational view.

Although the structure shown in the Hunt patent is relatively simple, the manner in which it is presented in the drawings tends to be confusing and lacks clarity. The uncontradicted testimony of the witness Lindberg (Transcript of Proceedings, pages 112 and 113) is therefore appropriate and, if Defendants-Appellees desired to substantiate a different interpretation, this testimony should have been contradicted.

Counsel's argument (Defendants-Appellees' Brief,

page 8) that the Patent Office “overlooked” Plaintiff’s own three point grapple is untenable since, as Counsel himself observes, the Examiner was furnished a picture of it.

On pages 12 and 13 of their Brief, Defendants-Appellees argue that the concept of “lopsided or unbalanced grip,” advanced by Plaintiff as being unobvious and a radical departure from accepted concepts of grapple structure at the time of the Lindberg invention, is an afterthought and contrary to the teachings of the Lindberg patent. Although the patent specification discusses the effect of the pads 55, 55’ (Fig. 5 of the Lindberg patent), the invention is not limited to the use of such pads. As the Court noted at trial (Transcript of Proceedings, page 147), the pads 55, 55’ are not in claim 1 of the patent and Plaintiff is not relying on them. From the time of the original filing of the Lindberg application, claims have been constantly asserted which do not recite the pads. As to Plaintiff’s argument of nonobviousness, based on “unbalanced grip,” this argument was presented to the Examiner during the prosecution of the Lindberg application (Plaintiff’s Exhibit 2, pages 38 and 39) and can be considered as basis for the Examiner’s allowance of the claims. This concept is not an “afterthought” or ex post facto inventing as in the *Graham* case relied upon by Defendants-Appellees. *Graham v. John Deere Co.*, 1966, 383 U.S. 1, 15 L.Ed. 2d 545. In the *Graham* case the “freeflex theory” was raised for the first time on appeal and hence the holding is not in point with the facts of this case.

B. LINDBERG IS THE FIRST INVENTOR

Defendants-Appellees urge invalidity of the Lindberg patent on the basis that Lindberg was not the first inventor as required by 35 U. S. C. 102 (g) (Defendants-Appellees' Brief, pages 14-16).

The making of an invention requires both conception and reduction to practice, *Consolidated Vultee Aircraft Corp. v. Maurice A. Gorbell, Inc.*, 204 F.2d 946 (CCA-9 1953). Lindberg reduced the invention to practice in March 1958, (Defendants' Exhibit 143, pages 14-15). Jenkins can rely only on the filing date of his patent application, October 9, 1959, (Plaintiff's Exhibit 4) for reduction to practice since the Jenkins Models (Defendants' Exhibits 125, 126 and 127) do not constitute a reduction to practice. This was acknowledged at trial (Transcript of Proceedings, page 179, lines 11-16). Defendants-Appellees claim prior conception of the invention, however, in 1956. This is supported only by oral testimony and no physical evidence of the date of conception exists. Even if Jenkins was first to conceive he did not use reasonable diligence in reducing the invention to practice as required by 35 U. S. C. 102 (g), which must be *proved* in order to relate the date of invention back to the date of conception. *Hann v. Venetian Blind Corp., et al.*, 111 F.2d 455, (CA-9 1940). This burden of proof has not been met.

The period of required diligence for the party first to conceive and last to reduce to practice starts just prior to the time his rival conceives or enters the field and continues until the first conceiver reduces the invention to practice. "Interference Law and Practice," Revise and Caesar § 178, Period of Re-

quired Diligence, Vol. 1, page 549; see also *Christie v. Seybold*, 55 F 69 (CCA-6 1893). The party Jenkins allowed an approximate 18 month period to elapse between the Lindberg conception and entry into the field in March 1958, and the filing of the Jenkins' patent application on October 9, 1959. During this critical period Jenkins caused a non-infringing commercial grapple structure to be built and sold in December 1958, and filed a patent application on the non-infringing structure in March 1959 (Plaintiff's Exhibit 3).

Defendants-Appellees seek to excuse Jenkins' delay in filing his patent application on the basis of his alleged "impecunious state" and his "ignorance of patent matters." No evidence has been offered, however, to prove either of these contentions. The fact that Jenkins consulted a Patent Attorney, Mr. Anderson, in September 1958 (Defendants' Exhibit 145, page 42) and filed another patent application (Plaintiff's Exhibit 3) indicates that he was not "ignorant of patent matters."

Defendants-Appellees chose not to pursue a defense under 102 (g) and introduced no evidence to show diligence required by this section of the statute at the trial of the case. As a result the Trial Court entered no finding related to priority of inventorship and Plaintiff had no occasion to introduce evidence of Jenkins' financial state. Since Defendants-Appellees made no objection to the Trial Court's findings or to the basis for the Court's decision they are precluded from trying the issue for the first time on appeal and without opportunity for the submission of evidence.

INFRINGEMENTS

A. THE CLAIM LANGUAGE ENCOMPASSES THE ACCUSED GRAPPLE STRUCTURE

As pointed out in Plaintiff-Appellant's Opening Brief, pages 20-21, the term "pivot means pivotally interconnecting said jaws" was purposely used to broaden the language of the claim and this language was allowed by the Patent Office. Likewise, the term "interconnected to at least one of said jaws", as applied to the control cable, was purposely used to broaden the claim and was found allowable by the Examiner. Appellant is not relying on the doctrine of equivalents so as to go outside the language of the claim to find infringement nor can the doctrine of equivalents be used in reverse to limit claim 1 (Plaintiff-Appellant's Opening Brief, page 22).

The Ninth Circuit Case, *Nelson v. Batson*, 9 Cir., 1963, 322 F.2d 132, 135, relied on by Appellees is a "doctrine of equivalents" case wherein the Court was asked to go beyond the language of the claim to find infringement. The Court held that the precise language, calling for "an outboard motor" as an element in a combination, did not include an inboard motor fixed to the deck. The holding in the *Nelson* case thus has no application to the present case.

In *Lockwood v. Langendorf United Bakeries, Inc.*, 9 cir., 1963, 324 F.2d 82, 88, (Defendants-Appellees' Brief, page 20) it was held that infringement can be found if the claim reads on the accused device and the accused device performs the same function and achieves the same result in substantially the same way. This is exactly the situation in the present case.

Claim 1 of the Lindberg patent reads directly on the accused device (Plaintiff-Appellant's Opening Brief, pages 11-13). The function of the two grapples is identical, i.e. two grapple jaws are closed by a control cable to grip the logs and the jaws will open by gravity. The result of obtaining an unbalanced grip or squeeze for heel boom loading of logs is the same and the result is obtained in the same manner by pivoting two jaws relative to one another and applying force on both jaws by a single control cable.

B. ADMISSIONS MADE DURING INTERFERENCE PROCEEDING

Plaintiff-Appellant's position as to the action taken by Defendants-Appellees during the interference between the parties is that they constitute admissions of infringement and are binding. The rule that admissions of infringement made during interference proceedings are binding on the parties, as set forth in *Albright-Nell Co. v. Autosteam Process Co.*, 7 Cir., 1934, 70 F.2d 959, cited by Appellees in their Brief, page 22, is based on the holding that the public has no interest, the issue being between the parties. The Court in that case distinguished between admissions of validity and admissions of infringement, noting that the former were not binding because of the duty owing to the public, citing *Haughey v. Lee*, 151 U.S. 282. In the case of *W. F. & John Barnes Co. v. International Harvester Co.*, D. C. N. D. Ill. E. D., 1943, 51 F. Supp. 254, although the court found it difficult to see the difference between public interest in the validity question and the infringement question as far as admissions are concerned, it was bound by the rule in the *Albright* case. In making its decision, however, it followed the exception to the rule ex-

pressed in *L. P. Larsen, Jr., Co. v. William Wrigley, Jr.*, 7 Cir., 253 F.914, 918 as follows:

[admissions are binding] . . . “unless the court can find an absolute demonstration from other evidence in the case or from facts within judicial notice, like the laws of physics, etc., that under no circumstances could the averments and admissions be true.”

There is no such demonstration in the present case wherein the claim reads squarely on the accused device and the breadth of the claim encompasses the accused structure.

Respectfully submitted,

BENJAMIN F. BERRY
CARL G. DOWREY
SEED, BERRY & DOWREY

1502 Norton Building
Seattle, Washington

L. R. GEISLER
Attorneys for
Plaintiff-Appellant

2400 S. W. Fourth Avenue
Portland, Oregon

CERTIFICATE OF SERVICE

A true copy of the foregoing Appellant's Reply Brief has been sent to J. Pierre Kolisch, Kolisch and Hartwell, 1004 Standard Plaza, Portland, Oregon 97204, as attorney for Appellees by United States mail this 20th day of October, 1967.

CARL G. DOWREY

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these rules.

CARL G. DOWREY

Counsel for Plaintiff-Appellant